Before the
Federal Communications Commission
Washington, D.C., 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	**WC Docket No. 07-245**
Amendment of the Commission's Rules	)	
and Policies Governing Pole Attachments	)	
	)	**RM-11293**
	)	**RM-11303**
	)	

ONCOR ELECTRIC DELIVERY COMPANY'S INITIAL COMMENTS

COUNSEL FOR ONCOR ELECTRIC DELIVERY COMPANY

J. Russell Campbell
Allen M. Estes
Lindsay S. Reese
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 2700
Birmingham, AL 35203-4644
T: (205) 251-8100
F: (205) 226-8799

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INITIAL COMMENTS

Oncor Electric Delivery Company ("Oncor") respectfully submits these initial comments to the Notice of Proposed Rulemaking ("NPRM") released by the Federal Communications Commission ("the Commission") on November 20, 2007, with a synopsis published in the Federal Register by the Commission on February 6, 2008, and subsequently corrected on February 12, 2008. Specifically, Oncor's initial comments focus on the following issues raised in the NPRM: (1) Safety & Reliability of Critical Electric Infrastructure; and (2) Commission Jurisdiction Over ILECs.

I. INTRODUCTION

A. Oncor Electric Delivery Company.

Oncor, the nation's sixth-largest U.S. electric distribution company, is a public utility company distributing electric service in more than 400 cities and 91 counties in Texas, nearly half of the state's geographic area.[1] Oncor and its predecessors have been serving Texas for more than 100 years.[2] Oncor's current service area includes the Dallas-Fort Worth area and surrounding cities, as well as Odessa, Midland, Killeen, Waco, Wichita Falls and Tyler.[3] Oncor currently provides power to more than 3 million homes and businesses and operates more than 115,000 miles of transmission and distribution lines

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[1] *See* Declaration of Karen Flewharty at ¶ 2 (Attached hereto as Exhibit A). For detailed information regarding Oncor *see* www. oncor.com.

[2] *See* Flewharty Decl. at ¶ 2.

[3] *See id.*

in Texas.[4] Oncor owns approximately 2 million distribution poles.[5] Of these 2 million distribution poles, approximately 1.2 million poles (60%) have at least one third-party attachment.[6]

B. Summary of Oncor's Comments.

While Oncor has a substantial interest in many, if not all, of the numerous issues set forth in the NPRM, Oncor focuses its initial comments on the following issues: (1) Whether the Commission should adopt specific safety, reliability or engineering standards of general applicability; and (2) Whether the Commission should take jurisdiction over ILEC attachments on electric utility poles. The answer to each question is "no."

Oncor's more than 100 years of experience in the electric transmission and distribution industry, in conjunction with the data, statistics, surveys and audits gathered through these years, demonstrates the following: (1) the Commission should allow electric utilities to set and enforce their own safety, reliability and engineering standards, subject to the Commission's *ad hoc* review for discriminatory treatment; and (2) even if the Commission decides it has jurisdiction over ILEC attachments on electric utility poles, it should decline to exercise such jurisdiction due to the unique nature and purpose of "joint use" relationships.[7]

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4 *See id.*

5 *See id.*

6 *See id.*

7 Oncor also supports the comments filed by Edison Electric Institute ("EEI").

II. SAFETY AND RELIABILITY OF CRITICAL ELECTRIC INFRASTRUCTURE

A. Whether the Commission Should Adopt Specific Access or Safety Standards.

1. Introduction.

The NPRM broadly seeks comment "on practices of attachers that have the potential to adversely impact the safety and reliability of an integral component of our nation's critical infrastructure, our electric power system."[8] The Commission also seeks comment on "the extent safety codes, such as the National Electrical Safety Code, should apply to all attachers, and whether the Commission's enforcement authority can or should be used to address alleged violations of such codes."[9] Further, the Commission seeks comment on whether "specific enforceable safety requirements should be adopted."[10] Of all the areas in which the Commission seeks comments, Oncor is most interested in providing the Commission with insight to, and evidence of, the issues and threats it faces on a daily basis as a provider of electric services and as a pole owner. Further, Oncor wants to explain why the Commission should defer to the standards and specifications established by the individual utilities, as opposed to adopting any general "best practices" or uniform engineering standards.

Providing safe and reliable electric service to its customers is Oncor's top priority. In fact, Oncor's dedication to maintaining a safe and reliable network is the cornerstone of the Joint Use Standards and Specifications applicable to all of Oncor's foreign

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[8] *NPRM*, 22 FCC Rcd 20195, ¶ 38 (Nov. 20, 2007). The pinpoint citations to the NPRM herein are references to the version released by the Commission on November 20, 2007.

[9] *Id.*

[10] *Id.*

attachments.[11] Oncor's chief safety and reliability concerns include: (1) permitting issues and unauthorized attachments; (2) violations of the NESC and Oncor's Joint Use Standards and Specifications; (3) recurring and unsafe overlashing without notification; (4) attempted use of boxing and bracketing construction; and (5) unsupervised manhole and vault access. While it is impossible to completely eliminate safety risks when dealing with electricity, these threats can be reduced by safe work practices and procedures.

2. The Commission Should Not Adopt "One-Size-Fits-All" Safety and Reliability Standards.

The Commission seeks comments addressing whether specific enforceable safety requirements should be adopted, and to what extent safety codes, such as the NESC, should apply to all attachers.[12] The Commission also seeks comments as to whether the Commission's enforcement authority "can or should be used to address alleged violations of such codes."[13] Oncor respectfully urges the Commission *not* to adopt rules of general applicability for safety, reliability or engineering, and to maintain the Commission's historical deference to utilities' safety standards.[14]

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11 *See* Declaration of Larry Kohrmann at ¶ 7 (Attached hereto as Exhibit B).

12 *NPRM*, ¶ 38.

13 *Id.*

14 *See Arkansas Cable Telecommunications Association v. Energy Arkansas, Inc.*, 21 FCC Rcd 2158, 2161 (2006) ("In adopting rules governing pole attachments, the Commission expressly declined to establish a comprehensive set of engineering standards that would govern when a utility could deny access to its poles based on capacity, safety, reliability, or engineering concerns."); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16073 (1996) ("In addition to operating under federal, state, and local requirements, a utility normally will have its own operating standards that dictate conditions of access. Utilities have developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise."); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16073 (1996) ("[W]e conclude that state and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulations under section 224(c).").

The Commission's role has traditionally been limited to ensuring non-discriminatory application of safety standards on an *ad hoc* basis. To now go further and impose uniform safety, reliability or engineering standards would require the Commission to reach beyond its expertise and beyond the authority granted to the Commission under the Pole Attachment Act.

a. The NESC is Not a Design or Construction Manual, and is Not a "Ceiling" for Safety Standards.

Under Texas law, the NESC is a mandatory (minimum) standard.[15] But, the NESC is not a construction manual. Section 010 of the NESC provides:

> These rules contain the **basic** provisions that are considered necessary for the safety of employees and the public under the specified conditions. This Code is **not intended as a design specification or as an instruction manual.**[16]
>
> For all particulars not specified in these rules, construction and maintenance should be done in accordance with accepted good practice for the given **local conditions** known at the time by those responsible for the construction and maintenance of the communication or supply lines and equipment.[17]

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[15] *See* Public Utilities Commission of Texas ("PUCT"), Chapter 25, Subchapter E(d) ("In determining standard practice, the commission shall be guided by the provisions of the American National Standards Institute, Incorporated, the National Electrical Safety Code, and such other codes and standards that are generally accepted by the industry, except as modified by this commission or by municipal regulations within their jurisdiction. **Each electric utility shall construct, install, operate, and maintain its plant, structures, equipment, and lines in accordance with these standards** ...."); *see also* Public Utility Regulatory Act ("PURA"), § 38.004 ("Notwithstanding any other law, a transmission or distribution line ... **must be constructed, operated, and maintained, as to clearances, in the manner described by the National Electrical Safety Code** ....").

[16] National Electrical Safety Code C2-2007 ("NESC"), Rule 010 (2007).

[17] NESC, Rule 012.

Furthermore, the NESC Handbook provides:

> Where the **local conditions** differ in some particular way from those specified in the NESC, it is the responsibility of the appropriate party to **recognize the differences in conditions with actions that constitute good practice under such different conditions**. Such practice may be reflected in the design of the installation, the construction practices, the maintenance practices, the operating practices, or some combination of the above, as applicable for the given local conditions [18] ... The NESC is a performance code, **not a set of design specifications**. The NESC construction rules specify what is to be performed, not how it is to be accomplished.[19]

As evidenced by the express language in the NESC, as well as the comments contained in the NESC Handbook, the NESC is neither the "ceiling" for safety standards nor the benchmark for reliability standards.[20] Therefore, while the NESC provides a good starting point in addressing safety concerns, pole owners should be able to (and in some cases, must) establish more stringent standards.[21] This is exactly what Oncor does.

A small number of Oncor's Standards and Specifications exceed those set forth in the NESC.[22] These more stringent standards are not only reflected in Oncor's Joint Use Standards, but also throughout its other Overhead and Underground Distribution

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[18] Allen L. Clapp, NESC Handbook, A Discussion of the National Electrical Safety Code, (Sixth Edition), commentary on NESC Rule 010 (Purpose), p. 3 (2006).

[19] *Id.* at 4.

[20] While the areas of "safety" and "reliability" have some overlap, the areas also implicate different concerns. For example, while performance of certain work may present little immediate safety threat on any given day, the performance of such work, as well as the quality of such work, may very well create a threat to the general public and the reliability of Oncor's services which will not be apparent until a subsequent date. In fact, the NESC requires that all facilities be designed and constructed for the "worse case" scenario for the given area (including ice storms, wind storms, hurricanes, etc.), a situation which invariably occurs after the installation of foreign attachments to Oncor's poles. Therefore, in addressing "safety" and "reliability," it is appropriate to consider the various implications conjunctively, as well as individually.

[21] *See* Kohrmann Decl. at ¶ 8.

[22] *See id.* at ¶10.

Construction Standards.[23] Third party attachment standards are merely a subset of Oncor's overhead distribution standards, and cannot be isolated from the bigger picture of overhead distribution safety and reliability.[24]

By way of example, while the NESC permits clearance from the highest communication attachment to the lowest electrical supply to be 30" for grounded neutrals,[25] Oncor requires 40" of clearance in all circumstances.[26] Oncor's 40" clearance requirement provides added safety and reliability. For operational reasons Oncor often has an energized secondary wire in place of a neutral on a pole line.[27] An untrained communications worker unfamiliar with electrical infrastructure may not be able to differentiate between the two similar looking wires.[28] Particularly with the number of unauthorized attachments on Oncor's system, the mandatory 40" clearance promotes a safer working environment on the poles.

Oncor's more stringent Standards and Specifications are aimed at increasing the safety and reliability of Oncor's infrastructure, while decreasing the impact of common and recurring problems caused by attachers. Such common violations include, but are not limited to: (1) unauthorized attachments; (2) spacing violations (*i.e.*, violations related to separation of conductors both at the pole and mid-span, and ground clearance over driveways, roads and highways); and (3) violations related to anchors and guy wires (*i.e.*

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23 *See id.* at ¶ 11.

24 *See id.*

25 *See* Kohrmann Decl. at ¶ 10.

26 *See id.*

27 *See id.*

28 *See id.*

failure to place attacher's own anchors and down guys, attaching to Oncor's anchors and failure to place guy markers).[29]

In addition to the more stringent standards established in Oncor's Joint Use Standards and Specifications, Texas' rulemaking bodies require more stringent standards.[30] For example, with regard to vertical clearances above ground, the NESC requires insulated communications conductors to maintain a vertical clearance of 15.5 feet above roads, streets and other areas subject to truck traffic.[31] By contrast, the Texas Department of Transportation's 2005 Utility Accommodation Policy, Section 21.41, requires a minimum clearance of 18 feet above highways for communication and cable television lines.[32] By law, Oncor must follow the more stringent Texas requirement.

In addition, while the NESC requires the same 15.5 feet of clearance over state roads for power neutrals meeting Rule 230.E.1., the Texas Department of Transportation requires 22 feet of clearance above its state roads and highways.[33] This increase in required clearance is aimed at maintaining the safety and reliability of Texas roads for the public, just as Oncor's Standards do for the electric infrastructure. Again, Oncor must follow the Texas regulations.

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29 *See id.* at ¶ 12.

30 *See id.* at ¶ 13.

31 *See id.*

32 *See id.*

33 *See id.*

b. The Commission Is Limited By Its Statutory Authority and Sphere of Regulatory Expertise.

The purpose of Section 224(f) was never to grant the Commission the authority to micro-manage safety, reliability, or engineering. This is evident by the fact that Section 224(f) devises no jurisdiction in the Commission with regard to access, safety or reliability, unlike the language set forth in Section 224(b) which explicitly vests the Commission with the authority "to regulate rates, terms, and conditions."[34] Furthermore, the Commission is not in the best position to determine the appropriate standards of construction for an electric distribution system.

The Commission fulfills its role with regard to safety and reliability standards (and access, generally) pursuant to the complaint procedures set forth in the Act, on an *ad hoc* basis. It is not the Commission's role to determine whether the actual standards are the best engineering practices, but only whether the standards are applied in a discriminatory manner.

c. The Adoption of Universal "Best Practices" is Neither Feasible Nor Practical.

To adopt a uniform, nationwide approach to addressing safety and reliability issues would undermine Oncor's ability to manage its system of poles and its relationships with the various attaching entities. It would also put Oncor, as well as its attachers, at odds with existing joint use agreements which set forth specific requirements designed to maintain the highest level of safety and reliability possible, including reasonable penalties for violations of certain safety procedures. Moreover, as mentioned above, the adoption of

[34] Similarly, Section 224(c) requires no "certification" that a state regulate access, as it does for "rates, terms, and conditions."

supposed "best practices" could violate many well-established standards set forth by various State and local governing bodies. In short, there are too many particularized variables specific to each individual utility to adopt a functioning uniform approach.

B. Results of Oncor's Safety and Compliance Audit.

In an effort to maintain a safe and reliable network, Oncor normally conducts pole attachment counts every five (5) years.[35] In addition to monitoring the number of attachments, these counts allow Oncor to observe the condition of the poles and the attachments.[36] If a condition is discovered which presents immediate harm to the public, such issues are immediately reported, allowing Oncor (or the offending attacher, if they will cooperate) to address the problem before it worsens.[37] Oncor's goal of maintaining a safe and reliable network is also furthered by its Permit Application Process (discussed below).

After finding excessive code violations during Oncor's permitting process and finding a high number of unauthorized attachments through Oncor's 2002-2003 attachment count, Oncor launched a system-wide Safety and Compliance Audit ("Compliance Audit") in April 2004.[38] The primary purposes of the Compliance Audit were: (1) to analyze the strengths and weaknesses within Oncor's pole network; (2) ensure that the various attachers were making and maintaining their attachments to Oncor's poles in accordance with NESC and Oncor standards; and (3) to identify a method for correcting such

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35 *See* Kohrmann Decl. at ¶ 14.

36 *See id.*

37 *See id.*

38 *See id.* at ¶ 15.

violations.[39] Oncor sampled each attacher's individual attachments, within designated systems, so that approximately 20% of the Oncor poles with attachments by that specific attacher would be reviewed in each of the following five years.[40] Sample selection criteria were created to ensure a consistent review of the attachments.[41] For example, if the specific attacher had between 1,000 and 5,000 total attachments, Oncor would sample 200 poles or 10% of the total poles to which the attacher was attached, whichever was greater.[42]

Prior to commencing the Compliance Audit, the attachers were notified of the systems to be audited and the expected start dates.[43] The attachers were also invited and encouraged to participate in the field inspection.[44] Of the eight attachers audited, seven participated in the process by assigning a representative (ranging from a supervisor to a contractor) to ride along with the Oncor inspector.[45] The participation level varied among the attachers, from riding with the Oncor inspector the entire length of the audit to simply monitoring periodically (every couple of weeks) in order to observe the type of violations being found.[46] Some of the attachers participated in a de-briefing after the completion of

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39 *See id.*

40 *See id.* at ¶ 16.

41 *See id.*

42 *See id.*

43 *See id.* at ¶ 17.

44 *See id.*

45 *See id.*

46 *See id.*

the Compliance Audit to address correction of the violations. The only attacher that failed to participate in the process actually had the highest number of violations.[47]

From April 2004 through March 2006, Oncor inspected 102,548 poles with third party attachers.[48] The results confirmed the concerns which served as the premise for the Compliance Audit. Violation rates for the attachers ranged from a low of 17% to a high of 44%, with the average violation rate for each attacher at 30%.[49] For example, 39,253 poles with attachments by one attacher revealed 12,953 poles with violations by that attacher (33% violation rate); 1,497 poles inspected with attachments by another attacher revealed 658 poles with violations (44% violation rate).[50] Of the 102,548 poles inspected, there were violations of the NESC and/or Oncor's Standards and Specifications on 30,764 poles.[51] The Compliance Audit revealed that the vast majority of the existing violations, many of which included overlashing and unauthorized attachments, were created by the third party attachers.[52]

C. Failure of Attachers to Follow Oncor's Permitting Process and Prevalence of Unauthorized Attachments.

The Commission seeks comment on the "prevalence"[53] of unauthorized attachments and "whether the Commission's existing enforcement mechanisms are sufficient to address any unlawful practices by attachers and ensure the safety and

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47 *See id.*

48 *See id.* at ¶ 18.

49 *See id.*

50 *See id.*

51 *See id.* at ¶ 19.

52 *See id.*

53 *NPRM*, ¶ 37.

reliability of critical electric infrastructure."[54] Unauthorized attachments are a widespread problem on Oncor's system, which threatens the safety and reliability of the system.[55] The Commission's current approach to unauthorized attachments (or, more specifically, provisions in pole attachment agreements addressing unauthorized attachments) does not appear to be deterring unauthorized attachments.

1. Decrease in Permit Applications and Prevalence of Unauthorized Attachments.

Before an attacher can attach to Oncor's poles, the attacher must receive approval from Oncor via its Permit Application Process.[56] An unauthorized attachment occurs when an attacher makes an attachment without prior approval of the pole owner.[57] Oncor's Permit Application Process is set forth in the pole attachment agreements negotiated by the parties, as well as Oncor's Standards and Specifications.[58] The fundamental purpose of Oncor's Permit Application Process is to allow Oncor the opportunity to inspect the pole prior to any attachment and, if necessary, make modifications or deny access, as appropriate, in order to preserve the safety and reliability of the distribution system.[59] The permitting process minimizes the incidence of safety violations which endanger communications and electric linemen and can adversely impact the safety and reliability of the distribution system.[60]

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54 *Id.*

55 *See* Kohrmann Decl. at ¶ 20.

56 *See id.*

57 *See id.*

58 *See id.*

59 *See id.*

60 *See id.*

The Permit Application Process only works, though, when attachers abide by it. Since 2004, the number of permit applications submitted to Oncor has decreased, while the number of unauthorized attachments in Oncor's system has increased.[61] The results of Oncor's 2002-2003 pole attachment count indicated more than 25,000 unauthorized attachments.[62] The current two-year attachment count process is 43% complete (*i.e.*, 43% of the sub-set of poles have been counted). To date, more than 13,100 unauthorized attachments have been found.[63] If this trend continues, Oncor will find more than **30,000 unauthorized attachments** at the conclusion of the two-year pole count. The increasing number of unauthorized attachments by third parties to Oncor's poles indicates that attachers are bypassing the Permit Application Process, and disregarding the safety and reliability of the system. Electric utilities cannot be certain that their distribution systems are safe and reliable so long as there are attachments of unknown number, size, and weight.

Fibertech argues in its petition that the permit application process is a medium whereby utilities unreasonably delay the attachers' access to the market.[64] This is the same *post hoc* rationalization advanced by other attachers to justify their repeated unauthorized attachments. That position holds no water since Oncor is not in commercial or retail competition with CATV and CLEC attachers (unlike ILEC pole owners), and has no

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61 *See id.* at ¶ 21.

62 *See id.*

63 *See id.*

64 "[T]he FCC should require utilities to complete (or allow licensee-hired contractors to complete) field surveys and identification of any necessary make-ready work within 30 days of receipt of a complete application and to finish make-ready work within 45 days of receiving payment for the work." *Petition for Rulemaking of Fibertech Networks*, Docket No. RM-11202, p. 17.

motivation to delay the attachers' speed to market.[65] The fact that an attacher's speed to the market may be slowed by the permitting and make-ready process is an unavoidable by-product of a process designed to ensure the safety and reliability of Oncor's electric distribution system.

Fibertech urges the Commission to adopt strict deadlines within which a pole owner must respond to permit applications and perform all necessary make-ready work.[66] Specifically, Fibertech urges the Commission to require utilities to complete field surveys and identification of any necessary make-ready work within thirty (30) days of receipt of a complete application and to finish make-ready work (no matter how extensive) within forty-five (45) days of receiving payment for the work.[67] While such deadlines might not be a problem for small jobs, the time to perform the make-ready work can vary significantly depending on many factors, some of which are beyond an electric utility's control (*i.e.*, weather and third party make ready).[68] In an effort to address such uncontrollable factors, Oncor's pole attachment agreements allow an attacher to submit no more than ten (10) permit applications collectively requesting a total of no more than one hundred twenty (120) attachments within any thirty day period.[69]

Fibertech's suggested deadlines also ignore the potentially significant engineering analysis and make-ready work that may be necessary to accommodate the requested attachments. While attachers maintain they are committed to safety and reliability and are

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65 *See* Flewharty Decl. at ¶ 6.

66 *See, e.g., Fibertech Petition*, pp. 16-18.

67 *See Fibertech Petition*, p. 17.

68 *See* Flewharty Decl. at ¶ 8.

69 *See id.* at ¶ 9.

only seeking ways to avoid delays, Oncor's Compliance Audit and the violation rate for third party attachments reveals otherwise. The Compliance Audit confirms the need for an orderly process which ensures attachments are made safely, and in a manner that does not compromise the safety or reliability of the system. The Commission has declined to adopt such restrictive deadlines for make-ready work in the past,[70] and should decline to adopt such guidelines now.

2. How the Commission Can Decrease the Number of Unauthorized and Non-Compliant Attachments.

Current Commission policy appears to have created a *disincentive* to comply with Oncor's permitting processes. In at least two specific cases addressing unauthorized attachments, the Commission has limited pole owners to recovery of back rent, plus modest interest – what the Commission described as "compensatory damages."[71] While Oncor recognizes that the Commission's holdings in these two cases are not rules of general applicability, they cast doubt on the enforceability of monetary penalties for unauthorized attachments.

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[70] *See Petition of Cavalier Telephone LLC Pursuant to Section 252(E) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Arbitration*, Memorandum Opinion and Order, WC Docket No. 02-359, 18 FCC Rcd. 25887 at ¶¶ 140-142 (2003) (FCC refused to adopt requested make-ready deadline because it would have required Verizon to attempt to renegotiate potentially all of its pole attachment license agreements, imposing a potentially unreasonable burden on Verizon in the absence of evidence of discriminatory treatment toward Cavalier).

[71] *See In the Matter of Mile Hi Cable Partners, LP, et al v. Public Service Company of Colorado*, 17 FCC Rcd. 6268 (2002) (discussing penalties for unauthorized attachments and stating that "there is no basis in the record to support a conclusion that Respondent is entitled to exemplary or punitive damages beyond compensatory damages"); *see also Salsgiver Communications, Inc. v. North Pittsburgh Telephone Company*, Memorandum Order and Opinion, EB-06-MD-004 (November 26, 2007) (holding that a $250 unauthorized attachment penalty was unreasonable and limiting recovery for unauthorized attachments to compensatory damages).

If the Commission's policy with respect to unauthorized attachments is, in fact, an "economic loss only" paradigm, attachers have absolutely no incentive to follow the attachment processes. In fact, there is an *incentive* to make unauthorized attachments, because unauthorized attachments save the attachers time (speed to market) and money (e.g., potential make-ready costs and engineering fees). When the violating attachers are finally caught, the Commission's policy puts the attachers in no worse a position than had they complied with the process in the first place.

If the Commission is serious about decreasing the prevalence of unauthorized attachments, it should allow pole owners to enforce their agreements. Oncor's pole attachment agreements have reasonable enforcement mechanisms (*i.e.*, back rent, with interest; in addition to a modest $25 per unauthorized attachment fee) which, if enforced, might deter unauthorized attachments.[72] When circumstances require, pole owners must have the ability to impose meaningful financial penalties to deter unauthorized attachments. The prevalence of unauthorized attachments cannot be expected to improve so long as the Commission gives attachers a financial incentive *not* to follow a pole owner's permitting process.

D. Overlashing.

The Commission broadly seeks comment regarding concerns associated with safety and capacity.[73] In recent years, overlashing has become a significant concern of Oncor's with regard to both safety and capacity. Overlashing is the technique whereby an attacher

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[72] *See* Flewharty Decl. at ¶ 19.

[73] *NPRM*, ¶ 38.

attaches an additional wire, or wires, to its own (or, for third-party overlashing, to other attachers') already existing messenger/support cables.[74]

On Oncor's system, the additional cables and/or wires routinely overlashed by cable companies usually contain dozens of strands of optical fiber.[75] The repetition of this process causes the diameter of the bundles to increase significantly, which in turn increases the overall weight of the attachment.[76] The increased weight of the overall attachment is further impacted by the effect of wind and ice loading.[77] For example, doubling the diameter of the attached wire doubles the amount of ice that can build-up and cause the pole to fail during an ice storm.[78]

Section 224 of the Act provides: "a utility providing electric service may deny a cable television system or any telecommunications carrier access ... on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[79] Pursuant to its rights set forth in the Act, Oncor's overlashing procedures and joint use agreements require prior written notification before a party can overlash to an existing cable.[80] Oncor requires prior notice so that it may perform a pre-overlashing inspection to: (1) ensure that the pole and cable to be overlashed do not have pre-existing violations of the NESC or Oncor's Standards and/or

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74 *See* Kohrmann Decl. at ¶ 22.

75 *See id.*

76 *See id.*

77 *See id.*

78 *See id.*

79 47 U.S.C. § 224(f).

80 *See* Flewharty Decl. at ¶ 10.

Specifications; (2) confirm that the desired overlashing will not create such violations; and (3) determine if any make-ready work is necessary.[81]

Despite the utilities' right to deny access based on safety and capacity concerns, the Commission's current policy arguably does not require approval by the pole owner prior to overlashing.[82] Oncor asserts that regardless of how overlashing is legally characterized, it presents a new burden on the poles which raises safety, reliability, capacity and engineering concerns.[83] However, without the opportunity to evaluate the condition of the pole and various attachments prior to overlashing, Oncor cannot assess the potential issues.[84] Oncor urges the Commission to defer to the utilities' established standards and specifications, as well as the provisions contained in the existing agreements, governing the overlashing process.

E. Boxing and Bracketing.

Fibertech's Petition specifically asks the Commission "to adopt a rule requiring utilities to allow the use of boxing and extension arms where (1) such techniques avoid pole replacement or make-ready work involving electrical facilities ...; (2) the facilities on the pole can be safely reached by a ladder or bucket truck; and (3) the pole owner has

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81 *See id.*

82 *See, e.g., In the Matter of the Cable Television Ass'n of Georgia, et al., v. Georgia Power*, 18 FCC Rcd. 16333 (August 8, 2003) (holding that a contract provision requiring notice prior to overlashing was unjust and unreasonable on its face); *but see Southern Co. Servs. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002) ("[T]he FCC rules do not preclude pole owners from negotiating with pole users to require notice before overlashing"); *Time Warner Cable of Kansas City v. Kansas City Power and Light Co.*, 14 FCC Rcd. 11599, ¶ 26 (July 15, 1999)(prohibiting cable company from proceeding with overlashing where make- ready was required to correct existing violations or to accommodate proposed overlashing).

83 *See* Kohrmann Decl. at ¶ 23.

84 *See id.*

previously allowed use of the technique."[85] The Commission seeks comments on "concerns regarding ... the use of boxing and extension arms."[86] Oncor urges the Commission to deny Fibertech's request to require utilities to allow boxing and extension arms.

"Boxing" is the placement of communications wires on both sides of a pole line.[87] "Bracketing" is the use of a standoff bracket for purposes of obtaining clearance for communications wires where there is not sufficient space to obtain requisite clearances.[88] Oncor prohibits boxing and bracketing in the communication space because of the impact it can have on the safety and reliability of the network.[89] Oncor's Specifications provide: "all aerial attachments shall be vertically arranged on the same side of the pole and mounted directly to the pole. No boxing of pole shall be allowed."[90] Even more specifically, Oncor's Specifications require that "[a]ttachment of telephone and other communication facilities shall be on the same side of the pole."[91]

With regard to bracketing/extension arms, many, if not all, of Oncor's attachment agreements prohibit the use of bracketing to obtain clearance.[92] On occasions when Oncor has been requested to allow the use of bracketing in order to obtain the 12" or 40" clearance requirements diagonally, Oncor has refused the requests due to additional safety

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85 *Fibertech Petition*, p. 13.

86 *NPRM*, ¶ 37.

87 *See* Kohrmann Decl. at ¶ 24.

88 *See id.*

89 *See id.*

90 *See id.* at ¶ 25.

91 *See id.*

92 *See id.* at ¶ 26.

and reliability concerns.[93] Like Oncor, the NESC does not allow bracketing to obtain the "diagonal" clearance Fibertech seeks.[94] Nevertheless, Fibertech urges the Commission to adopt a rule **mandating** the allowance of bracketing to achieve *diagonal* clearance.

Both practices, but boxing in particular, limit the use of climbing as a means of maintenance and repair.[95] The practices of boxing and bracketing also increase the already existing complexity of attaching and maintaining attachments in compliance with the NESC and Oncor's Standards and Specifications.[96] Furthermore, boxing and bracketing slow down the process of pole change-outs, complicate transfers, and make both more costly.[97] The Commission should defer to utilities' established safety and reliability standards, and deny Fibertech's request.

F. Manhole and Vault Access.

The *Fibertech Petition* urges the Commission to adopt a rule allowing "utility-approved contractors to work in manholes without utility supervision" and to allow competitors to "survey manholes to determine availability of conduit."[98] Oncor prohibits manhole and vault access without the supervision of an Oncor employee or representative, and urges the Commission to deny this request.

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93 *See id.*

94 *See id.*; *see also* NESC, Tables 235-1 and 235-5.

95 *See* Kohrman Decl. at ¶ 27.

96 *See id.*

97 *See id.*

98 *Fibertech Petition*, p. 5.

A manhole is a confined underground concrete structure used as an access point for making connections or performing maintenance on underground utility cables.[99] A vault is typically a room that houses underground electrical equipment as well as cables, and may be surface level or subsurface level.[100] Performing work in and around manholes and vaults creates unique safety and reliability concerns because of the sophistication of the underground network and exposure of equipment and cables from multiple circuits energized at both primary and secondary distribution voltages.[101] Due to the configuration of the network, underground cables are capable of producing currents ranging from a few thousand amps to over 100,000 amps during fault events (a typical main breaker in a home breaker panel is sized at 200 amps).[102] Oncor representatives coordinate all activities requiring manhole access with its Distribution Operations Centers to maintain as safe of an environment as possible.[103] Furthermore, not even all Oncor employees are allowed to access Oncor's manholes and vaults.[104] Only Oncor employees specifically trained in working within manhole and vault areas are allowed to access these areas and/or allowed to supervise work being performed.[105]

Unlike when dealing with overhead lines, the underground network presents increased risks because it has no communications worker's safety zone, nor does it have

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99 *See* Kohrmann Decl. at ¶ 28.

100 *See id.*

101 *See id.* at ¶ 29.

102 *See id.*

103 *See id.*

104 *See id.*

105 *See id.*

the clearance requirements that overhead lines do.[106] From the minute a worker accesses the manhole or vault, she is within the power supply space, surrounded by live wires, which drastically increases the risk of electrocution.[107] Flooding and standing water create additional safety concerns when working in the underground network.[108] Moreover, because workers who access the manholes and vaults are often working within confined spaces, the risk of oxygen deficiency is also a concern.[109] Because of the increased risks associated with manholes and vaults, any worker accessing these areas must be intimately familiar with these increased risks and properly trained in mitigating these risks to avoid injury. Therefore, Oncor requests that the Commission defer to the long-established and functional procedures, standards, and guidelines currently employed and allow Oncor to continue restricting access to its manholes and vaults to properly trained personnel.

III. THE COMMISSION SHOULD NOT EXERCISE JURISDICTION OVER ILEC ATTACHMENTS ON ELECTRIC UTILITY POLES.

The Commission's NPRM requests comments on: (1) whether the text of Section 224 of the Pole Attachment Act clearly excludes ILECs from enjoying regulated attachment rates; (2) whether, to the extent there is any ambiguity in the text of Section 224, Congress intended to grant ILECs regulated attachment rates; and (3) whether, even if Congress correctly excluded ILECs from having regulated attachment rates in 1996, conditions have sufficiently changed to warrant a reversal of that exclusion.[110] The short

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106 *See id.* at ¶ 30.

107 *See id.*

108 *See id.*

109 *See id.*

110 *NPRM*, ¶ 25.

answers to these questions are: the text of Section 224 *does* explicitly exclude ILECs; Congress *did* intend it that way; and, nothing has changed since 1996 that would warrant a change by this Commission to Congress' original policy.

The Edison Electric Institute ("EEI") is filing comments addressing the threshold issue of why the Commission *cannot*, under the plain language of Section 224, exercise jurisdiction over ILEC attachments on electric utility poles. Oncor files these additional comments to show why the Commission (in the event it ignores the plain language of Section 224) *should not* assert jurisdiction over ILEC attachments on electric utility poles.

A. Who are the ILECs and Why Must They be Treated Differently?

ILECs are local telephone companies that provided (usually monopolistic) service in defined geographic areas leading up to the passage of the Telecommunications Act of 1996. They are the established, dominant telephone service providers, and they own a significant network of poles. In fact, ILECs' significant pole ownership (*e.g.*, AT&T currently owns almost 1 million poles in Texas, and presently owns 42% of the poles in joint use with Oncor), their market position, and the corresponding potential for anticompetitive behavior by ILECs, were among the reasons the Act defined ILECs as "utilities" rather than "attachers."[111]

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[111] *See* 47 U.S.C. § 224(a)(5) ("For purposes of this section, the term 'telecommunications carrier' does not include any incumbent local exchange carrier...."); *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, 6781 (FCC 1998) ("The 1996 Act ... specifically excluded incumbent local exchange carriers ("ILECs") from the definition of telecommunications carriers with rights as pole attachers. Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC has no rights under Section 224 with respect to the poles of other utilities. This is consistent with Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants.").

Because both ILECs and electric utilities own a network of poles, they have historically entered into joint use agreements to share infrastructure costs and to reduce pass-through costs to consumers. These joint use relationships between ILECs and Oncor have existed for more than 80 years without Commission intervention, and should not be disturbed.[112]

B. Oncor's Joint Use Agreements and the Relationships with ILECs.

Oncor has multiple joint use agreements with twelve ILECs in its service region.[113] Some of these agreements have been in place for more than 80 years.[114] Many of these agreements are based in whole, or in part, on the model joint use agreement published by EEI and the Bell System (a/k/a AT&T) in 1926.[115] Oncor's two largest ILEC attachers are AT&T (f/k/a Southwestern Bell) and Verizon (f/k/a GTE). The attachments made by AT&T and Verizon constitute 85% of all of ILEC attachments in Oncor' system.[116]

1. Oncor's joint use agreements with ILECs differ from Oncor's attachment agreements with other third parties.

Most of Oncor's joint use agreements are based on the concept of parity, meaning that the ILEC and Oncor share the cost of ownership relative to the space allocated on each pole, taking into account a negotiated allotment of the burden and costs.[117] These joint use agreements are not "rental" agreements because any value provided by one party to the other would offset the additional costs of ownership (*e.g.*, construction, maintenance, etc.)

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112 *See* Flewharty Decl. at ¶ 11.

113 *See id.*

114 *See id.*

115 *See id.*

116 *See id.* at ¶ 14.

117 *See id.* at ¶ 12.

borne by the party owning poles in excess of contractual parity.[118] Indeed, most of Oncor's joint use agreements define the "annual" payment by the deficient party not as a "rental payment," but rather as an "adjustment payment."[119] In reality, no money exchanges hands between Oncor and either AT&T or Verizon for the purpose of rentals.[120] The joint use agreements between Oncor and its twelve ILECs reflect the true nature of the relationship (both pole owners) and have, with minor exceptions, worked well without government interference.

2. The relative ownership and relationship between Oncor and its ILEC Partners have not significantly changed since 1996.

The contractual parity ratios for Oncor and its largest two ILEC attachers are: 58/42 for AT&T; and 60/40 for Verizon.[121] The parties have made it a priority to maintain parity. For example, the year 2000 pole count revealed AT&T and Verizon were out of parity.[122] In order to achieve parity, AT&T purchased approximately 15,500 poles from Oncor, while Verizon purchased about 19,300 poles.[123] The fact that Oncor's ILEC agreements are still based on an eighty-year-old agreement (and have not significantly changed in decades), when viewed in conjunction with the pole sales/purchases to achieve/maintain parity discussed above, answers the Commission's question regarding whether it should now regulate ILEC attachments – No, the relationships are working.

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118 *See id.*

119 *See id.* at ¶ 13.

120 *See id.*

121 *See id.* at ¶ 15.

122 *See id.* at ¶ 14.

123 *See id.*

While some ILECs make it a priority to maintain parity, certain ILECs in Oncor's system choose to disregard their parity obligations for financial gain because they find it more beneficial to pay the contractual adjustment rates than to meet the parity benchmarks. These ILECs have made the unilateral business decision to cut costs by shifting the expense of pole ownership to Oncor and other electric utilities.

To the extent the ILECs' unilateral decisions have created changes in parity, the changes should not constitute justification for bringing ILECs within the rate protections of Section 224. This is particularly true considering that Oncor's distribution system was constructed to accommodate joint use agreements with ILECs.[124] Imposing a single regulated rate many years after construction would "pull the rug" from under this foundational principle on which the infrastructure was built (and intended to be maintained) and would create a windfall by allowing ILECs to avoid the expense of maintaining the network while simultaneously enjoying a lower, regulated attachment rate.

3. There have been no changes in bargaining power between Oncor and ILECs since 1996.

Despite any nominal changes in relative ownership between some smaller ILECs and Oncor (caused primarily by the ILECs' unilateral decision to stop setting and maintaining poles), no ILEC has lost any bargaining power against Oncor. Oncor still must attach to the significant number of poles that ILECs own in Oncor's service area.[125] Today, Oncor is attached to approximately 275,000 ILEC poles, giving ILECs plenty of

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[124] *See id.* at ¶ 20.

[125] *See id.* at ¶ 16.

power when negotiating rates for making attachments to Oncor's network.[126] In fact, AT&T remains one of the largest pole owners in Texas, owning almost 1 million distribution poles.[127]

C. Additional Consequences of Giving the Commission Jurisdiction over ILECs.

1. Imposing a single regulated rate on ILEC attachments would be inherently unreasonable because relationships between ILECs and electric utilities lack uniformity.

There is not now, and never has been, uniformity in relationships between Oncor and the multiple ILECs operating within Oncor's system. Parity levels differ. Rate levels differ. And the pole networks differ based on geography, demographics, and overall demand for electric and telephone services.[128] As a result of these differences, Oncor's ILEC agreements differ in several areas (in addition to the parity levels discussed above).[129]

For example, the schedules for pole inventories differ. AT&T's agreement requires a joint inventory "no less than once every five years" whereas Verizon's agreement provides that the inventory is to be conducted on a five-year rolling schedule with either 20% done per year or 100% in the same year.[130] Other ILEC agreements do not even provide for regular pole inventories (Embarq).[131] The various schedules for pole inventories affect economic considerations of ILEC agreements because more frequent

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126 *See id.*

127 *See id.*

128 *See id.* at ¶ 17.

129 *See id.* at ¶ 18.

130 *See id.*

131 *See id.*

inventories mean more frequent assessments of whether the parties are achieving parity, which in turn, mean more sales/purchases of poles and/or adjustments of rates.

With regard to the periodic adjustment of rates, some ILEC agreements require arbitration if an agreement for the implementation of a new rate cannot be reached within a set number of days, while others either provide a formula to be used if an agreement cannot be reached or provide a fixed percentage to be used to determine the new rate each year.[132] For example, AT&T's agreement requires the parties to arbitrate if an agreement on rates cannot be reached within 60 days after a rate change is submitted in writing, whereas Verizon's agreement provides that the following formula will be used to calculate the rate if no agreement is reached: ½ x carrying charges x net cost of bare pole.[133] At the same time, Valor Telecommunications' and Windstream's (f/k/a ALLTEL) agreements simply provide that the rate will be adjusted 3% each year.[134] Further, some agreements provide for rates per pole, while other agreements provide for rates per "contact".[135] Finally, some agreements provide a back rent penalty multiplier of 2.5, whereas other agreements provide for a back rent multiplier of 5 x the rate or no back rent multiplier at all.[136]

All of these ILEC agreements differ in material ways, mostly because of negotiations between the parties.[137] Given this lack of uniformity, it would be inherently

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132 *See id.*

133 *See id.*

134 *See id.*

135 *See id.* A single attacher might have multiple "contacts" on a given pole.

136 *See id.*

137 *See id.*

unreasonable to apply a single regulatory paradigm to the myriad of relationships between ILECs and Oncor (much less nationwide).

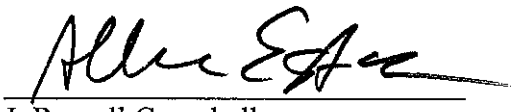
2. *Bringing ILECs within the coverage of Section 224 would place the entire burden of establishing and maintaining the nation's critical infrastructure of utility poles on electric utilities.*

If the Commission were to take jurisdiction over ILEC attachments on electric utility poles, all joint use agreements between ILECs and Oncor would have to be thrown out because the concept of mutuality would no longer exist between the parties. ILECs would no longer be "partners" in the networks, would no longer contribute to the construction and upkeep of the networks, and would have less incentive (if any) to respect or ensure the safety and reliability of the networks. The entire burden of ownership for the nation's pole infrastructure ultimately would shift entirely to the electric utilities and their customers.

IV. CONCLUSION

Oncor appreciates the opportunity to comment on these critical matters, and to provide the Commission with insight into Oncor's distribution system and practices, as well as its relationships with ILECs. Oncor urges the Commission: (1) to decline the invitation to adopt general rules of applicability impacting electric distribution system safety, reliability, and engineering; and (2) to decline exercising jurisdiction over ILEC attachments due to the unique nature and purpose of "joint use" relationships. Oncor looks forward to offering further comments and evidence in reply to the comments submitted by other interested parties.

Respectfully submitted,



COUNSEL FOR ONCOR ELECTRIC DELIVERY COMPANY

J. Russell Campbell
Allen M. Estes
Lindsay S. Reese
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 2700
Birmingham, AL 35203-4644
T: (205) 251-8100
F: (205) 226-8799

March 7, 2008

EXHIBIT A

DECLARATION OF KAREN FLEWHARTY

Before the
Federal Communications Commission
Washington, D.C., 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
Amendment of the Commission's Rules and	)	
Policies Governing Pole Attachments	)	RM-11293
	)	RM-11303
	)	

DECLARATION OF KAREN FLEWHARTY

1. My name is Karen Flewharty. I am currently employed by Oncor Electric Delivery Company, LLC ("Oncor") as Joint Use Manager. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity as Joint Use Manager for Oncor.

2. Oncor (f/k/a TXU Electric Delivery), the nation's sixth-largest U.S. electrical distribution company, is a public utility company distributing electric service in more than 400 cities and 91 counties in Texas, nearly half of the state's geographic area. Oncor and its predecessors have been serving Texas for more than 100 years. Oncor's current service area includes the Dallas-Fort Worth area and surrounding cities, as well as Odessa, Midland, Killeen, Waco, Wichita Falls and Tyler. Oncor provides power to more than 3 million homes and businesses, and operates more than 115,000 miles of transmission and distribution lines in Texas. Oncor owns approximately 2 million distribution poles. Of Oncor's 2 million distribution poles, approximately 1.2 million poles (60%) have at least one third-party attachment.

3. I have been the Joint Use Manager for Oncor for 3.5 years, and have been with the company for a total of 9.5 years. Prior to becoming Joint Use Manager, I worked in the Distribution Operations Dispatch Center as a support engineer. I also worked on distribution design organization and managed large scale maintenance programs before becoming Joint Use Manager.

4. As Joint Use Manager, I am directly involved with the development and execution of Oncor's joint use agreements. In my tenure as Joint Use Manager, Oncor has entered into approximately 37 third party attachment agreements (or renewals of agreements).

5. I offer this testimony in support of the initial comments filed by Oncor in response to the FCC's Pole Attachment Notice of Proposed Rulemaking, WC Docket 07-245.

6. Oncor is not in commercial or retail competition with CATV and CLEC attachers.

7. Before an attacher can attach to Oncor's poles, the attacher must receive approval from Oncor via its Permit Application Process. This process is set forth in the pole attachment agreements negotiated by the parties, as well as Oncor's Standards and Specifications.

8. The time to perform the make-ready work required before attachments can vary significantly depending on many factors, some of which are beyond Oncor's control (including weather and third party make ready).

9. Oncor's attachment agreements allow a licensee to submit no more than ten (10) permit applications collectively requesting a total of no more than one hundred twenty (120) attachments within any thirty day period.

10. Oncor's established overlashing procedures and joint use agreements require prior written notification before a party can overlash to an existing cable. Oncor requires prior notice so that it may perform a pre-overlashing inspection to: (1) ensure that the pole and cable to be overlashed do not have pre-existing violations of the NESC or Oncor's Standard and/or Specifications; (2) confirm that the desired overlashing will not create such violations; and (3) determine if any make-ready work is necessary.

11. Oncor has multiple joint use agreements with twelve ILECs in its service region. Some of these agreements have been in place for more than 80 years. Many of these agreements are based in whole, or in part, on the model joint use agreement published by the Edison Electric Institute ("EEI") and the Bell system (ATT) in 1926.

12. Oncor's ILEC joint use agreements have not significantly changed in the past 80 years and most are based on the concept of parity. These joint use agreements are not "rental" agreements because any value provided by one party to the other offsets the additional costs of ownership (construction, maintenance, etc.) borne by the party owning poles in excess of contractual parity.

13. Most of Oncor's joint use agreements define the "annual" payment by the deficient party not as a "rental payment," but rather as an "adjustment payment." In reality, no money exchanges hands between Oncor and either of its two largest ILEC attachers (AT&T and Verizon) for the purpose of rentals.

14. Oncor's two largest ILEC attachers are AT&T (f/k/a Southwestern Bell) and Verizon (f/k/a GTE). The attachments made by AT&T and Verizon combined cover 85% of all of Oncor's joint use poles. After Oncor's 2000 pole count, AT&T and Verizon were out of parity. In order to achieve parity, AT&T purchased approximately 15,500 poles from Oncor, while Verizon purchased about 19,300 poles.

15. The contractual parity ratios for Oncor and its largest two ILEC attachers are: 58/42 for AT&T and 60/40 for Verizon.

16. Oncor attaches to a significant number of ILEC poles in Oncor's service area. Today, Oncor is attached to approximately 275,000 ILEC poles. AT&T remains one of the largest pole owners in Texas, owning almost 1 million distribution poles.

17. Pole networks differ based on geography, demographics, and overall demand for electric and telephone services.

18. Oncor's ILEC agreements differ in several ways, mostly because of negotiations between the parties. These differences include, but are not limited to, the following:

a. AT&T's agreement requires joint inventory "no less than once every five years" whereas Verizon's agreement provides that the inventory is to be conducted on a five-year rolling schedule with either 20% done per year or 100% in the same year. Other ILEC agreements do not provide for regular pole inventories (Embarq);

b. AT&T's agreement requires the parties to arbitrate if an agreement on rates cannot be reached within 60 days after a rate change is submitted in writing. Verizon's agreement provides that the following formula will be used to calculate the rate if no agreement is reached: ½ x carrying charges x net cost of bare pole. Valor Telecommunications' and Windstream's (f/k/a ALLTEL) agreements simply provide that the rate will be adjusted 3% each year;

c. Some ILEC joint use agreements provide for rates per pole, while other agreements provide for rates per contact; and

d. Some ILEC joint use agreements provide a back-rent penalty multiplier of 2.5, whereas other agreements provide for a back-rent multiplier of 5 x the rate or no back-rate multiplier at all.

e. The differences in these agreements are, at least in part, the result of negotiations between the parties.

19. Oncor's pole attachment agreements with CATV, CLEC and other attachers have enforcement mechanisms (i.e. back rent, with interest; in addition to a $25 per unauthorized attachment fee) to deter unauthorized attachments.

20. Oncor's electrical distribution pole network was constructed to accommodate joint use with ILECs.

21. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 7TH day of March, 2008.

Karen Flewharty

Karen Flewharty.
Joint Use Manager, Oncor Electric Delivery Company, LLC

EXHIBIT B

DECLARATION OF LARRY KOHRMANN

Before the
Federal Communications Commission
Washington, D.C., 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
Amendment of the Commission's Rules and	)	
Policies Governing Pole Attachments	)	RM-11293
	)	RM-11303
	)	

DECLARATION OF LARRY KOHRMANN

1. My name is Larry Kohrmann. I am currently employed by Oncor Electric Delivery Company, LLC ("Oncor") as Distribution Standards Manager.

2. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity as Distribution Standards Manager for Oncor.

3. I have been the Distribution Standards Manager for Oncor for over 3 years, and have been with the company for a total of 23 years. My job responsibilities as Distribution Standards Manager include oversight of Oncor's Distribution Construction, design and equipment standards, National Electrical Safety Code ("NESC") interpretation, distribution equipment and construction related policy creation and interpretation, and information interface between distribution equipment and Oncor's Distribution Information System.

4. My declaration addresses certain specific issues impacting the safety and reliability of Oncor's distribution system. I offer this testimony in support of the initial comments filed by Oncor in response to the FCC's Pole Attachment Notice of Proposed Rulemaking, WC Docket 07-245.

5. Oncor's overhead distribution construction standards (which include third-party attachment standards) are based on a number of different factors. These factors include, but are not limited to, field experience, geography, climate, materials and distribution system studies.

6. Oncor's standards are not static. As we learn new lessons, these standards are routinely updated. For this very reason, Oncor's pole attachment and joint use agreements include provisions that require attaching entities to comply with Oncor's Joint Use Standards and Specifications as revised from time to time.

7. Oncor's dedication to maintaining a safe and reliable network is the cornerstone for Oncor's Joint Use Standards and Specifications applicable to all of Oncor's foreign attachments.

8. In some instances, Oncor's Joint Use Standards and Specifications exceed the requirements of the NESC. The NESC contains a good baseline for third party attachment standards. However, it would be harmful to the safety and reliability of Oncor's distribution system for the NESC to be considered a "ceiling" on standards. The NESC Handbook itself recognizes that the NESC standards are not appropriate in every instance, and that "local conditions" may call for different practices. *See* NESC Handbook, p. 3 (6th ed. 2006). Further, the NESC is a safety code – not a construction code.

9. The Public Utilities Commission of Texas ("PUCT") and the Public Utility Regulatory Act ("PURA") both mandate that Oncor construct, install, operate and maintain its structures, equipment, and lines in accordance with, at least, the baseline requirements of the NESC.

10. Examples of Oncor's Standards and Specifications which exceed the NESC to protect Oncor's system include, but are not limited to, the following:

a. Oncor Standards and Specifications require that attachers maintain 12" vertical clearance between communication lines in the communications space, whereas the NESC allows lesser clearance when there is "agreement between the parties involved." Oncor's experience is that 12" spacing is required at all times to maintain the highest levels of safety and reliability.

b. The NESC permits clearance from the highest communication attachment to the lowest electrical supply to be 30" for grounded neutrals. Oncor requires 40" clearance in all circumstances. Oncor's mandate that 40" clearance exist at all times with regard to the neutrals provides added safety and reliability. By way of example only, for operational reasons Oncor often has an energized secondary wire in place of a neutral on a certain pole line. An untrained communications worker unfamiliar with electrical infrastructure may not be able to differentiate between the two identical looking wires, necessitating the requisite clearance be maintained at all times.

c. The NESC permits a grounded neutral a 12" mid-span clearance to communication cables. Oncor's Standards and Specifications require 30" mid-span clearance for a grounded neutral and communications cable at all times. Again, this provides additional safety for communications and electrical workers, and in turn greater reliability of Oncor's infrastructure.

d. While the NESC only requires that communications attachments be "effectively grounded," Oncor requires a bond at every pole to maintain a safe and reliable system.

11. More stringent standards are not only reflected in Oncor's Joint Use Standards, but also throughout its other Overhead and Underground Distribution Construction Standards. Third party attachment standards are merely a subset of Oncor's overhead distribution standards.

12. Oncor's more stringent Standards and Specifications are aimed at increasing the safety and reliability of Oncor's infrastructure, while decreasing the impact of Oncor's common and reoccurring problems caused by attachers. Such common violations include, but are not limited to, the following: (1) unauthorized attachments; (2) spacing violations (*i.e.*, violations related to separation of conductors both at the pole and mid-span, and ground clearance over driveways, roads and highways); and (3) violations related to anchors and guy wires (*i.e.*, failure to place attacher's own anchors and down guys, attaching to Oncor's anchors, and failure to place guy markers).

13. In addition to the more stringent standards established in Oncor's Joint Use Standards and Specifications, Texas' rulemaking bodies often require more stringent standards. Examples include:

a. With regard to vertical clearances above ground, the NESC requires insulated communications conductors to maintain a vertical clearance of 15.5 feet above roads, streets, and other areas subject to truck traffic. By contrast, the Texas Department of Transportation's 2005 Utility Accommodation Policy, Section

21.41, requires a minimum clearance of 18 feet above highways for communication and cable television lines.

b. While the NESC requires the same 15.5 feet of clearance for power neutrals meeting Rule 230E1 over state roads, the Texas Department of Transportation requires 22 feet of clearance above its state roads and highways.

14. Oncor has implemented processes and procedures to ensure it maintains a safe and reliable network, including pole attachment counts conducted every five (5) years which permit Oncor to identify and address potential and existing code violations and safety concerns. In addition to monitoring the number of attachments, these counts allow Oncor the opportunity to observe the condition of the poles and the attachments. If a condition is discovered which presents immediate harm to the public, such issues are immediately reported, allowing Oncor (or the offending attacher) to address the problem before it worsens.

15. After finding excessive code violations during Oncor's permitting process and finding a high number of unauthorized attachments as a result of Oncor's attachment audit, Oncor launched a system-wide Safety and Compliance Audit ("Compliance Audit") in April 2004. The purposes of the Compliance Audit were: (1) to analyze the strengths and weaknesses within Oncor's network; (2) ensure that the various attachers were making and maintaining their attachments to Oncor's poles in accordance with NESC and Oncor standards; and (3) identify methods for correcting such violations.

16. During the Compliance Audit, the inspector was to sample each attacher's individual attachments, within designated systems, so that approximately 20% of the Oncor poles with attachments by that specific attacher would be sampled in each of the following five years. A

sample selection criteria was created to ensure a consistent review of the attachments. For example, if the specific attacher had between 1,000 and 5,000 total attachments, Oncor would sample 200 poles or 10% of the total poles to which the attacher was attached, whichever was greater.

17. Prior to commencing the Compliance Audit, Oncor's various attachers were notified of the systems to be audited and the expected start dates. The attachers were encouraged to participate in the field inspection. Of the eight attachers audited, seven participated in the process by assigning a representative (ranging from a supervisor to a contractor) to ride along with the Oncor inspector. The only attacher which failed to participate in the process actually had the highest number of violations. The participation level varied among the attachers, from riding with the Oncor inspector the entire length of the audit to simply monitoring periodically (every couple of weeks) in order observe the type of violations being found. Some of the attachers participated in a de-briefing after the completion of the Compliance Audit to address the curing of the found violations, and even expressed gratitude for the process.

18. From April 2004 through March 2006, Oncor inspected 102,548 poles with third party attachers. Violation rates for the attachers ranged from a low of 17% to a high of 44%, with the average violation rate for each attacher at 30%. For example, 39,253 poles with attachments by one attacher revealed 12,953 poles with violations by that attacher (33% violation rate); 1,497 poles inspected with attachments by another attacher revealed 658 violations (44% violation rate).

19. Of the 102,548 poles inspected, there were violations of the NESC and/or Oncor Standards or Specifications on 30,764 poles. The Compliance Audit revealed that the vast

majority of the existing violations, many of which consisted of overlashing and unauthorized attachments, were created by the third party attachers. To date, the majority of the violations discovered in the Compliance Audit by the third party attachers have not been cured.

20. Unauthorized attachments are a widespread problem on Oncor's system which threatens the safety and reliability of the system. Before an attacher can attach to Oncor's poles, the attacher must receive approval from Oncor via its Permit Application Process. An unauthorized attachment occurs when an attacher makes an attachment without the approval of the pole owner. Oncor's Permit Application Process is set forth in the pole attachment agreements negotiated by the parties, as well as Oncor's Standards and Specifications. The fundamental purpose of Oncor's Permit Application Process is to allow Oncor the opportunity to inspect the pole prior to any attachment and, if necessary, make modifications or deny access, as appropriate, in order to preserve the safety and reliability of the distribution system. The permitting process minimizes the incidence of safety violations which endanger the communications worker and can adversely impact the safety and reliability of the distribution system.

21. Since 2004, the number of permit applications submitted to Oncor has decreased, while the number of unauthorized attachments in Oncor's system has increased. The results of Oncor's 2002-2003 pole attachment count indicated more than 25,000 unauthorized attachments. The current two-year attachment count process is 43% complete (*i.e.*, 43% of the sub-set of poles have been counted). To date, more than 13,100 unauthorized attachments have been found.

22. Overlashing has become a significant concern of Oncor's in recent years. Overlashing is the technique whereby an attacher attaches an additional wire, or wires, to its own (or, for third-party overlashing, to other attachers') already existing messenger/support cables. On Oncor's

system, the additional cables and/or wires routinely overlashed by cable companies usually contain dozens of strands of optical fiber. The repetition of this process causes the diameter of the bundles to increase significantly, which in turn increases the overall weight of the attachment. The increased weight of the overall attachment is further impacted by the effect of wind and ice loading. Doubling the diameter of the attached wire doubles the amount of ice that can build-up and cause the pole to fail during an ice storm.

23. Overlashing presents a new burden on Oncor's poles which raises safety, reliability, capacity and engineering concerns. Without the opportunity to evaluate the condition of the pole and various attachments prior to overlashing, Oncor cannot assess the potential issues.

24. Boxing and bracketing present safety and reliability concerns to Oncor's network. "Boxing" is the placement of communications wires on both sides of a pole line. "Bracketing" is the use of a standoff bracket for purposes of obtaining clearance for communications wires where there is not sufficient space to obtain requisite clearances. Oncor prohibits boxing and bracketing in the communication space because of the impact it can have on the safety and reliability of the network.

25. With regard to boxing, Oncor's Specifications provide: "all aerial attachments shall be vertically arranged on the same side of the pole and mounted directly to the pole. No boxing of pole shall be allowed." Even more specifically, Oncor's Specifications require that "[a]ttachment of telephone and other communication facilities shall be on the same side of the pole."

26. With regard to bracketing/extension arms, many, if not all, of Oncor's attachment agreements prohibit the use of bracketing to obtain clearance. Similarly, the NESC does not allow bracketing to be used to obtain "diagonal" clearance. Neither Oncor nor the NESC recognizes the diagonal clearance distances which Fibertech seeks to achieve. On occasions when Oncor has been requested to allow the use of bracketing in order to obtain the 12" or 40" clearance requirements diagonally, Oncor has refused to grant such requests due to safety and reliability concerns.

27. Boxing and bracketing, boxing in particular, limit the use of climbing as a means of maintenance and repair. The practices of boxing and bracketing also increase the already existing complexity of attaching and maintaining attachments in compliance with the NESC and Oncor Joint Use Standards and Specifications. Furthermore, boxing and bracketing slow down the process of pole change-outs, complicate transfers, and make both more costly.

28. Access to Oncor's manholes and vaults without Oncor supervision would create significant safety and reliability issues. A manhole is a confined underground concrete structure used as an access point for making connections or performing maintenance on underground utility cables. A vault is typically a room that houses underground electrical equipment, as well cables, and may be surface level or subsurface level.

29. Performing work in and around manholes and vaults creates unique safety and reliability concerns because of the sophistication of the underground network and exposure of equipment and cables from multiple circuits energized at both primary and secondary distribution voltages. Due to the configuration of the network, underground cables are capable of producing currents

ranging from a few thousand amps to over 100,000 amps during fault events (a typical main breaker in a home breaker panel is sized at 200 amps). Oncor representatives coordinate all activities requiring manhole access with its Distribution Operations Centers to maintain as safe an environment as possible. Not even all Oncor employees are allowed to access Oncor's manholes and vaults. Only Oncor employees specifically trained in working within the manhole and vault are allowed to access such areas and/or allowed to supervise work being performed in such areas.

30. Unlike when dealing with overhead lines, the underground network presents increased risks because it has no communications worker's safety zone, nor does it have the clearance requirements that overhead lines do. From the minute a worker accesses the manhole or vault, she is within the power supply space, surrounded by live wires, which drastically increases the risk of electrocution. Flooding and standing water create additional safety concerns when working in the underground network. Moreover, because workers who access the manholes and vaults are often working within confined spaces, the risk of oxygen deficiency is also a concern. Because of the increased risks associated with manholes and vaults, any worker accessing these areas must be intimately familiar with the increased risks and properly trained in how to mitigate such risks to avoid injury.

31. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the seventh day of March, 2008.

Larry Kohrmann